Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBERT W. SHIMER,
VINCENT J. FIRTH
EQUITY FINANCIAL GROUP, LLC,
Petitioners,

COMMODITY FUTURES TRADING COMMISSION
Respondent

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

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APPENDIX VOLUME II

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Date: November 27, 2009

U.S. Constitution Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless he or she is on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

28 U.S. C. §1291

Sec. 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

7 U.S.C. § 1a(5)

The term ``commodity pool operator'' means any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of

enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility, except that the term does not include such persons not within the intent of the definition of the term as the Commission may specify by rule, regulation, or order

17 C.F.R. § 4.10(d)(1)

Pool means any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests.

TITLE 17--COMMODITY AND SECURITIES EXCHANGES

CHAPTER I--COMMODITY FUTURES TRADING COMMISSION

PART 4_COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS--
Table of Contents

Subpart B_Commodity Pool Operators

Sec. 4.22 Reporting to pool participants.

17 C.F.R. §4.22 (a) (1)(i, ii, iii, vi, & vii):

(a) Except as provided in paragraph (a)(4) of this section, each commodity pool operator registered or required to be registered under the Act must periodically distribute to each participant in each pool that it operates, within 30 calendar days after the last date of the reporting period prescribed in paragraph (b) of this section, an Account Statement, which shall be presented in the form of a Statement of Income (Loss) and a Statement of Changes in Net Asset Value, for the prescribed period. These financial statements must be presented and computed in accordance with generally accepted accounting principles consistently applied. The Account Statement must be signed in accordance with paragraph (h) of this section.

(1) The portion of the Account Statement which must be presented in the form of a Statement of Income (Loss) must separately itemize the following information:

(i) The total amount of realized net gain or loss **on commodity interest positions liquidated** during the reporting period;

(ii) The change in unrealized net gain or loss ***on commodity interest positions*** during the reporting period;

(iii) The **total amount of net gain or loss** from all other transactions in which the pool engaged during the reporting period, including interest and dividends earned on funds not paid as premiums or used **to margin the pool's commodity interest positions**;

(iv) The total amount of all management fees during the reporting period;

(v) The total amount of all advisory fees during the reporting period;

(vi) **The total amount of *all brokerage commissions during the reporting period***;

(vii) The total amount of other **fees for commodity interest and other investment transactions** during the reporting period; and

(viii) The total amount of all other expenses incurred or accrued by the pool during the reporting period.

17 C.F.R. §4.22 (a)(3):

(3) The Account Statement must also disclose any material business dealings between the pool, **the pool's operator,** commodity trading advisor, **futures commission merchant**, or the principals thereof **that previously have not been disclosed** in the pool's Disclosure Document or
any amendment thereto, other Account Statements or Annual Reports.

17 C.F.R. §4.22 (e):

(e) The Statement of Income (Loss) required by this section **must itemize brokerage commissions,** management fees, advisory fees, incentive fees, interest income and expense, **total realized net gain or loss from commodity interest trading, and change in unrealized net gain or loss on commodity interest positions during the pool's fiscal year. Gains and losses on commodity interests need not be itemized by commodity or by specific delivery or expiration date.**

Sec. 4.23 Recordkeeping.

17 C.F.R. §4.23 (a)(1):

Each commodity pool operator registered or required to be registered under the Act must make and keep the following books and records in an accurate, current and orderly manner at its main business office and in accordance with Sec. 1.31. All books and records required by this section except those required by paragraphs (a)(3), (a)(4), (b)(1), (b)(2) and (b)(3) must be made available to participants for inspection and copying during normal business hours at the main business office of the pool operator.

(a) Concerning the commodity pool:

(1) An itemized daily record of each commodity interest transaction of the pool, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or underlying physical, the futures commission merchant carrying the account and the introducing broker, if any, whether the commodity interest was purchased, sold, exercised, or expired, and the gain or loss realized.

17 C.F.R. §4.23 (a)(7):

(7) Copies of each confirmation of a commodity interest transaction of the pool, each purchase and sale statement and each monthly statement for the pool received from a futures commission merchant.

17 C.F.R. §4.23 (b)(1) & (2):

(b) Concerning the commodity pool operator:

(1) **An itemized daily record of each commodity interest transaction of the commodity pool operator and each principal thereof, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or** underlying physical, **the futures commission merchant carrying the account** and the introducing broker, if any whether the commodity interest was purchased, sold, exercised, or expired, and the gain or loss realized.

(2) Each confirmation **of a commodity interest transaction,** each purchase and sale statement and each monthly statement **furnished by a futures commission merchant to (i) the commodity pool operator relating to a personal account of the pool operator,** and (ii) each principal of the pool operator relating to a personal account of such principal.

(3) Books and records of all other transactions in all other activities in which the pool operator engages. Those books and records must include cancelled checks, bank statements, journals, ledgers, invoices, computer generated records and all other records, data and memoranda which have been prepared in the course of engaging in those activities.

Sec. 4.24 General disclosures required.

Except as otherwise provided herein, a Disclosure Document must include the following information.

17 C.F.R. §4.24(b)(1):

(b) Risk Disclosure Statement. (1) The following Risk Disclosure Statement must be prominently displayed immediately following any disclosures required to appear on the cover page of the Disclosure Document as provided by the Commission, by any applicable federal or state securities laws and regulations or by any applicable laws of non-United States jurisdictions.

RISK DISCLOSURE STATEMENT

YOU SHOULD CAREFULLY CONSIDER WHETHER YOUR FINANCIAL CONDITION PERMITS YOU TO PARTICIPATE IN A COMMODITY POOL. IN SO DOING, YOU SHOULD BE AWARE THAT FUTURES AND OPTIONS TRADING CAN QUICKLY LEAD TO LARGE LOSSES AS WELL AS GAINS. SUCH TRADING LOSSES CAN SHARPLY REDUCE THE NET ASSET VALUE OF THE POOL AND CONSEQUENTLY THE VALUE OF YOUR INTEREST IN THE POOL. IN ADDITION, RESTRICTIONS ON REDEMPTIONS MAY AFFECT YOUR ABILITY TO WITHDRAW YOUR PARTICIPATION IN THE POOL. **FURTHER, COMMODITY POOLS MAY BE SUBJECT TO**

SUBSTANTIAL CHARGES FOR MANAGEMENT, AND ADVISORY AND **BROKERAGE FEES. IT MAY BE NECESSARY** FOR THOSE POOLS THAT ARE SUBJECT TO THESE CHARGES **TO MAKE SUBSTANTIAL TRADING PROFITS** TO AVOID DEPLETION OR EXHAUSTION OF THEIR ASSETS. THIS DISCLOSURE DOCUMENT CONTAINS A COMPLETE DESCRIPTION OF EACH EXPENSE TO BE CHARGED THIS POOL AT PAGE (insert page number) AND A STATEMENT OF THE PERCENTAGE RETURN NECESSARY TO BREAK EVEN, THAT IS, TO RECOVER THE AMOUNT OF YOUR INITIAL INVESTMENT, AT PAGE (insert page number).

THIS BRIEF STATEMENT CANNOT DISCLOSE ALL THE RISKS AND OTHER FACTORS NECESSARY TO EVALUATE YOUR PARTICIPATION IN THIS COMMODITY POOL. THEREFORE, BEFORE YOU DECIDE TO PARTICIPATE IN THIS COMMODITY POOL, YOU SHOULD CAREFULLY STUDY THIS DISCLOSURE DOCUMENT, INCLUDING A DESCRIPTION OF THE PRINCIPAL RISK FACTORS OF THIS INVESTMENT, AT PAGE (insert page number)

17 C.F.R. §4.24(b)(2):

(2) **If the pool may trade foreign futures or options contracts,** the Risk Disclosure Statement must further state:

YOU SHOULD ALSO BE AWARE THAT **THIS COMMODITY POOL *MAY TRADE* FOREIGN FUTURES OR OPTIONS CONTRACTS.**

TRANSACTIONS ON MARKETS LOCATED OUTSIDE THE UNITED STATES, INCLUDING MARKETS FORMALLY LINKED TO A UNITED STATES MARKET, MAY BE SUBJECT TO REGULATIONS WHICH OFFER DIFFERENT OR DIMINISHED PROTECTION TO THE POOL AND ITS PARTICIPANTS FURTHER, UNITED STATES REGULATORY AUTHORITIES MAY BE UNABLE TO COMPEL THE ENFORCEMENT OF THE RULES OF REGULATORY AUTHORITIES OR MARKETS IN NON-UNITED STATES JURISDICTIONS WHERE TRANSACTIONS FOR THE POOL MAY BE EFFECTED.

17 C.F.R. §4.24(e)(5) & (6):

(e) Persons to be identified. The names of the following persons:

(1) Each principal of the pool operator;

(2) The pool's trading manager, if any, and each principal thereof;

(3) Each major investee pool, the operator of such investee pool, and each principal of the operator thereof;

(4) Each major commodity trading advisor and each principal thereof;

(5) **Which of the foregoing persons will make trading decisions for the pool;** and

(6) **If known, the futures commission merchant through which the pool will execute its trades, and, if applicable, the introducing broker through which the pool will introduce its trades to the futures commission merchant.**

17 C.F.R. §4.24 (f)(1)(v):

(f) Business background (1) The business background, for the five years preceding the date of the Disclosure Document, of:

(i) The commodity pool operator;

(ii) The pool's trading manager, if any;

(iii) Each major commodity trading advisor;

(iv) The operator of each major investee pool; and

(v) **Each principal of the persons referred to in this paragraph (f)(1) who participates in making trading** or operational **decisions for the pool** or who supervises persons so engaged.

17 C.F.R. §4.24(g):

(g) Principal risk factors. A discussion of the principal risk factors of participation in the offered pool. This discussion must include, without limitation, risks relating to volatility, leverage, liquidity, and counterparty creditworthiness, as applicable **to the types of trading programs to be followed, trading structures to be employed** and investment activity expected to be engaged in by the offered pool.

17 C.F.R. §4.24 (h)(1)(i):

(h) Investment program and use of proceeds. The pool operator must disclose the following:

(1) **The types of commodity interests** and other interests **which the pool will trade**, including:

(i) The approximate percentage of the pool's assets **that will be used to trade commodity interests**, securities and other types of interests, categorized by type of commodity or market sector, type of security

(debt, equity, preferred equity), whether traded or listed on a regulated exchange market, maturity ranges and investment rating, as applicable;

17 C.F.R. §4.24(h)(2):

(2) A description of the trading and investment programs and policies that will be followed by the offered pool, including the method chosen by the pool operator concerning **how futures commission merchants carrying the pool's accounts shall treat offsetting positions** pursuant to Sec. 1.46 of this chapter, if the method is other than to close out all offsetting positions or to close out offsetting positions on other than a first-in, first-out basis, **and any material restrictions or limitations on trading required by the pool's organizational documents** or otherwise. This description must include, if applicable, an explanation of the systems used to select commodity trading advisors, investee pools and types of investment activity to which pool assets will be committed;

17 C.F.R. §4.24 (h)(3)(i & ii):

(3)(i) A summary description of the pool's major commodity trading advisors, including their respective percentage allocations of pool assets, a description of **the nature and operation of the *trading programs* such advisors will follow, including the types of interests *traded* pursuant to such programs, and each advisor's historical experience trading such program** including material information as to volatility,

leverage and rates of return and **the length of time during which *the advisor has traded* such program**;

(ii) A summary description of the pool's major investee pools or funds, including their respective percentage allocations of pool assets and a description of the nature and operation of such investee pools and funds, including for each investee pool or fund **the types of interests traded**, material information as to volatility, leverage and rates of return for such investee pool or fund and the period of its operation; and

17 C.F.R. §4.24(h)(4)(i & ii):

(4)(i) The manner in which the pool will fulfill **its margin requirements** and the approximate percentage of the pool's assets that will be held in segregation pursuant to the Act and the Commission's regulations thereunder;

(ii) If the pool will fulfill **its margin requirements** with other than cash deposits, the nature of such deposits; and

17 C.F.R. §4.24(i)(2)(ii, iii & x):

(i) Fees and expenses (1) The Disclosure Document must include a complete description of each fee, commission and other expense which the commodity pool operator knows or should know has been incurred by the pool for its preceding fiscal year and is expected to be incurred by the pool in its current fiscal year, including fees or other expenses incurred in connection with the pool's participation in investee pools and funds.

(2) This description must include, without limitation:

(i) Management fees;

(ii) **Brokerage fees** and commissions, including interest income **paid to futures commission merchants;**

(iii) Fees and commissions paid **in connection with trading advice provided to the pool**;

(x) **Clearance fees** and fees **paid to national exchanges** and self-regulatory organizations;

17 C.F.R. §4.24(j)(3):

(j) Conflicts of interest. (1) A full description of any actual or potential conflicts of interest regarding any aspect of the pool on the part of.

(i) The commodity pool operator;

(ii) The pool's trading manager, if any;

(iii) Any major commodity trading advisor;

(iv) The commodity pool operator of any major investee pool;

(v) Any principal of the persons described in paragraphs (j)(1) (i),
(ii), (iii) and (iv) of this section; and

(vi) Any other person providing services to the pool or soliciting participants for the pool.

(2) Any other material conflict involving the pool.

(3) Included in the description of such conflicts must be any arrangement whereby a person may benefit, directly or indirectly, **from the maintenance of the pool's account with the futures commission merchant or from the introduction of the pool's account to a futures**

commission merchant by an introducing broker (such as payment for order flow or soft dollar arrangements) or from an investment of pool assets in investee pools or funds or other investments.

17 C.F.R. §4.24(l)(1)(iii):

(l) Litigation. (1) Subject to the provisions of Sec 4.24(l)(2), any material administrative, civil or criminal action, whether pending or concluded, within five years preceding the date of the Document, against any of the following persons; Provided, however, that a concluded action that resulted in an adjudication on the merits in favor of such person need not be disclosed:

(i) The commodity pool operator, the pool's trading manager, if any, the pool's major commodity trading advisors, and the operators of the pool's major investee pools;

(ii) Any principal of the foregoing; and

(iii) **The pool's futures commission merchants and introducing brokers**, if any.

17 C.F.R. §4.24(m):

(m) Trading for own account. **If the commodity pool operator**, the pool's trading manager, any of the pool's commodity trading advisors or any principal thereof **trades or intends to trade commodity interests for its own account**, the pool operator must disclose whether participants will be permitted to inspect the records **of such person's trades** and any written policies related to such trading.

17 C.F.R. §4.24(s)(1, 3, 4 & 5):

(s) Inception of trading and other information. (1) The minimum aggregate subscriptions **that will be necessary for the pool to commence trading commodity interests;**

(2) The minimum and maximum aggregate subscriptions that may be contributed to the pool,

(3) The maximum period of time the pool will hold funds **prior to the commencement of trading commodity interests**;

(4) The disposition of funds received **if the pool does not receive the necessary amount to commence trading,** including the period of time within which the disposition will be made; and

(5) Where the pool operator will deposit funds received **prior to the commencement of trading by the pool,** and a statement specifying to whom any income from such deposits will be paid.

Sec 4.25 Performance disclosures.

17 C.F.R. §4.25(a)(1)(i)(C):

(a) General principles--(1) Capsule performance information--(i) For pools. Unless otherwise specified, disclosure of the past performance of a pool must include the following information. Amounts shown must be net of any fees, expenses or allocations to the commodity pool operator.

(A) The name of the pool;

(B) A statement as to whether the pool is:

(1) Privately offered pursuant to section 4(2) of the Securities Act of 1933, as amended (15 U.S.C. 77d(2)), or pursuant to Regulation D thereunder (17 CFR 230.501 et seq.);

(2) A multi-advisor pool as defined in Sec. 4.10(d)(2); and

(3) A principal-protected pool as defined in Sec. 4.10(d)(3);

(C) **The date of inception of trading;**

17 C.F.R. §4.25(a)(1)(ii)(A) & (B):

(ii) For accounts. Disclosure of the past performance of an account required under this Sec. 4.25 must include the following capsule performance information:

(A) The name of the commodity trading advisor or other person **trading the account** and the name of the trading program;

(B) **The date** on which the commodity trading advisor or other person trading **the account began trading client accounts and the date when client funds began being traded** pursuant to the trading program;

17 C.F.R. §4.25(b)(1):

(b) Performance disclosure when the offered pool has at least a three-year operating history. The commodity pool operator must disclose the performance of the offered pool, in accordance with paragraphs (a)(1)(i) (A) through (H) and (a)(2) of this Sec. 4.25, where:

(1) The offered pool **has traded commodity interests for three years or more**, and

(2) For at least such three-year period, seventy-five percent or more of the contributions to the pool were made by persons unaffiliated with the commodity pool operator, the trading manager (if any), the pool's commodity trading advisors, or the principals of any of the foregoing.

17 C.F.R. §4.25(c)(1)(i)&(ii):

(c) Performance disclosure when the offered pool has less than a three-year operating history--(1) Offered pool performance. (i) The commodity pool operator must disclose the performance of the offered pool, in accordance with paragraphs (a)(1)(i)(A) through (H) and (a)(2) of this Sec. 4.25, or

(ii) If the offered pool has no operating history, the pool operator must prominently display the following statement:

THIS POOL HAS NOT COMMENCED TRADING AND DOES NOT HAVE ANY PERFORMANCE HISTORY.

17 C.F.R. §4.25(c)(2)(i)(A):

(2) Other performance of commodity pool operator. (i)(A) Except as provided in Sec. 4 25(a)(8), the

commodity pool operator must disclose, for the period specified by Sec 4.25(a)(5), the performance of each other pool operated by the pool operator (and by the trading manager if the offered pool has a trading manager) in accordance with paragraphs (a)(1)(i) (C) through (H) and (a)(3) of this Sec. 4.25, and the performance of each other account traded by the pool operator (and by the trading manager if the offered pool has a trading manager) in accordance with paragraphs (a)(1)(ii) (C) through (G) of this Sec. 4.25. If the trading manager has been delegated complete authority **for the offered pool's trading**, and the trading manager's performance is not materially different from that of the pool operator, the performance of the other pools operated by and accounts traded by the pool operator is not required to be disclosed.

17 C.F.R. §4.25(c)(2)(ii):

(ii) If neither the pool operator or trading manager (if any), nor any of its trading principals has operated any other pools or traded any other accounts, the pool operator must prominently display the following statement: NEITHER THIS POOL OPERATOR (TRADING MANAGER, IF APPLICABLE) NOR ANY OF ITS TRADING PRINCIPALS **HAS PREVIOUSLY OPERATED ANY OTHER POOLS OR TRADED ANY OTHER ACCOUNTS**. If the commodity pool operator or trading manager, if applicable, is a sole proprietorship, reference to its trading principals may be deleted from the prescribed statement.

17 C.F.R. §4.25(c)(3)(ii):

(3) Major commodity trading advisor performance. (i) The commodity pool operator must disclose the performance of any accounts (including pools) directed by a major commodity trading advisor in accordance with paragraphs (a)(1)(ii) (C) through (G) of this Sec. 4.25.

(ii) If a major commodity trading advisor has not previously traded accounts, the pool operator must prominently display the following statement:

(name of the major commodity trading advisor), A COMMODITY TRADING ADVISOR THAT HAS DISCRETIONARY TRADING AUTHORITY OVER (percentage of the pool's funds available for commodity interest trading allocated to that trading advisor) PERCENT **OF THE POOL'S FUTURES AND COMMODITY OPTION TRADING** HAS NOT PREVIOUSLY DIRECTED ANY ACCOUNTS

17 C.F.R. §4.25(c)(4)(ii):

(4) Major investee pool performance. (i) The commodity pool operator must disclose the performance of any major investee pool.

(ii) If a major investee pool has **not commenced trading,** the pool operator must prominently display the following statement: (name of the major investee pool), AN INVESTEE POOL THAT IS ALLOCATED (percentage of the pool assets allocated to that investee pool) PERCENT OF THE POOL'S ASSETS **HAS NOT COMMENCED TRADING.**

Case 1:04-cv-01512-RBK-AMD Document 5
Filed 04/01/2004

In the United States District Court
For the District Of New Jersey

Commodity Futures Trading Commission,
Plaintiff

Civil Action No.

vs

Equity Financial Group LLC,
Tech Traders, Inc
Vincent J. Firth
Robert W. Shimer,
Defendants

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR EX PARTE STATUTORY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I. INTRODUCTION

The commodity Futures Trading Commission (the "Commission" or "CFTC") seeks emergency injunctive relief to enjoin the fraudulent activities of the Defendants, who are engaged in multi-million dollar solicitation through a web site at http://shastacapitalassociates.com/ and other venues. While touting performance results of approximately 100% or more per year since 2001, Defendants equity Financial Group, LLC ("Equity") and Vincent Firth ("Firth") have solicited and received at least $5 7 million, and likely substantially

more, from at least 29 investors for participation interests in Shasta Capital Associates, LLC ("Shasta"), a commodity pool.[1] In a Private Placement Memorandum distributed to investors and prospective investors, equity and Firth claim that pool participant funds in Shasta are placed with a trading company with access to a managed futures trading system for the trading of commodity futures and selected financial markets While Equity and Firth falsely tout Shasta's "astonishing" performance of 100% or more per annum, it in fact appears that the trading accounts into which the pool participants' funds were placed actually have suffered large losses that have not been disclosed to the pool participants

Although undisclosed in the Private Placement Memorandum and referred to only as the "private trading company," the Commission has learned that the trading company that is trading Shasta investor funds is Tech Traders, Inc. ("Tech Traders") Tech Traders illegally accepted pool participant funds in its own name and misrepresented to the futures commission merchants carrying those accounts that the funds were its own. Tech Traders has incurred trading losses of at least $3.5 million during the last 12 months alone

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[1] A commodity pool is an enterprise engaged in the business of investing its pooled funds in trading commodity futures or options It is analogous to a mutual fund. The collection of common, pooled funds are used to execute transactions on behalf of the entire pooled account, transactions are not allocated to any particular investor The participants' share in accrued profits and losses from the commodity trading on a *pro rata* basis; that is, to the extent they contributed funds to the pool, they get the same percentage of the profits and the losses charged to them *See, e g , Lopez v. Dean Witter Reynolds, Inc ,* 805 F 2d 880 (9th Cir 1986), *CFTC v Heritage Capital Advisory Services, Ltd ,* [1982-1984 Transfer Binder] Comm. Fut L Rep (CCH) ¶ 21,627 at 26,384 (N D. Ill 1982), *Meredith v ContiCommodity Services, Inc ,* [1980-1982 Transfer Binder] Comm. Fut L. Rep (CCH) ¶ 21,107 at 24,462 (D D C 1980)

C. The Court Erred In Its Conclusion That An Entity Such As Shasta Was Intended By Congress To Be Regulated As A Commodity Pool By The CFTC.

On page 9 of its Opinion dated October 4, 2005 the Court concludes ""Shasta is precisely the form of entity Congress authorized the CFTC to regulate as a commodity pool."[12] This conclusion follows a three page analysis of case law in which the Court's discussion focused primarily on *Heritage*, *Lopez* and *Meredith*. It is unclear how a discussion of case law that is completely compatible with the conclusion that Shasta is not a commodity pool per the four tests of *Lopez* supports the Court's stated conclusion on page 9 concerning the intent of Congress. That lack of clarity is further compounded by the fact that neither *Lopez*, *Heritage*, nor *Meredith* engaged in an analysis of Congressional intent with respect to the commodity pool issue presently before the Court for re-consideration.

1. The Court's Opinion dated October 4, 2005 engaged in no analysis of the legislative history of the CEA as amended by the Commodity Futures Trading Commission Act of 1974 to

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[12] See the last sentence of the first paragraph on page 9 That first paragraph on page 9 actually begins on page 8 of the Court's Opinion dated October 4, 2005.

support the Court's conclusion regarding the intent of Congress with respect to an entity such as Shasta.

In its opinion dated October 4, 2005 the Court begins its analysis of the "commodity pool" issue by citing a sentence from the introductory paragraph (entitled "Short Explanation") to Senate Report No. 93-1131 previously cited by the *Lopez* Court.[13] It is interesting to note that even though this particular selected sentence is one of several sentences in that introductory paragraph of the Senate Report, the sentence chosen by both *Lopez* and now the Court refers to the importance of "fair practice" and "honest dealing" on *the commodity exchanges* (which, of course, is exactly where all *actual trading* of commodity futures contracts occurs). This stated concern reflected in the introductory paragraph of Senate Report No. 93-1131 mirrored the concern of H.R 13113, a House of Representatives Bill that had

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[13] It should be noted that this one sentence from Senate Report No 93-1131 is the only reference ever made in the *Lopez* decision to any part of the "legislative history" of the Commodity Futures Trading Commission Act of 1974 other than to point out in its decision that the CEA (as amended in 1974) did not provide the *Lopez* court with any assistance in resolving the threshold issue of whether or not Dean Witter's CGAP account was a commodity pool (See *Lopez*, page 883). *Lopez* found it unnecessary to engage in any extensive analysis of the legislative history of the 1974 amendments to the CEA to construct its four tests The four tests of Lopez were simply a compilation of previous case law

been referred to the Senate Committee on Agriculture and Forestry and was the subject of the Senate Report. The stated purpose of HR 13113 was to amend the Commodity Exchange Act "to strengthen the regulation of *futures trading*". (Emphasis added). See S. Rep. No. 1131, 93rd Con. 2d Sess , reprinted in 1974 U.S. Code Cong & Ad. News, 5843).

No other reference to the legislative history of the Commodity Futures Trading Commission Act of 1974 (hereinafter the "Act") is found in the Court's Opinion dated October 4, 2005. In light of the fact that the actual language of the sentence cited by the Court refers to a concern on the part of Congress for "fair trading" and "honest dealing" *on the exchanges* (where actual futures contract trading occurs), it is difficult to see how that single sentence from the Senate Report is at all helpful in determining that an entity that the CFTC admits has never opened a commodity trading account to trade futures contracts [14] can be said to be the type of entity that was of concern to Congress at the time the CEA was amended by the Act to create the CFTC in 1974.

2. The legislative history of the CEA as amended by the Commodity Futures Trading Commission Act of 1974 provides no basis for

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[14] See footnote on Page 1 of the CFTC's Response dated August 5, 2005 to Shimer's previous Motion For Summary Judgment dated July 7, 2005

the Court's conclusion that entities such as Shasta not engaged in the actual trading of commodity futures contracts were intended by Congress to be regulated by the newly created CFTC as commodity pools.

a. A brief summary of the stated reasons given in Senate Report No. 93-1131 for the 1974 Act that amended the CEA creating the CFTC.

The purpose of the Act (constituting the 1974 amendments to the CEA that created the CFTC) was the need (as cited in Senate Report No 93-1131) for better and extended regulation of the existing commodity futures markets. The Senate Report noted that "since the 1968 amendments to the Commodity Exchange Act, there has been a major shift to a market-oriented economy. As a result futures markets are playing an increasingly important role in the pricing and marketing of the Nation's commodities." S. Rep. No. 1131, 93rd Con. 2d Sess., reprinted in 1974 U.S. Code Cong & Ad. News, 5843, 5858).

The Senate Report noted that: "(w)hile the futures markets in a number of agricultural commodities have been regulated in varying degrees since 1922, many large and important futures markets are completely unregulated by the Federal Government." [15] The list of unregulated markets

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[15] See S Rep. No 1131, 93rd Con 2d Sess , reprinted in 1974 U.S. Code Cong & Ads. News, 5843, 5859)

included coffee, sugar, cocoa, lumber, plywood and various metals "including the highly sensitive silver market and markets in a number of foreign currencies".[16] The Senate Report thus concluded that "(a) person trading in one of the currently unregulated futures markets should receive the same protection afforded to those trading in the regulated markets". [17]

That same Senate Report noted an increased awareness by the consumer "that futures markets have a direct effect on such matters as his grocery bill and the cost of his home." [18] The Report concluded. "(i)n order to assure that futures markets operate properly and that the prices consumers pay are not artificially high, careful and efficient supervision of the markets is essential" [19] The Senate Report also noted that "(t)he value of futures trading has reached $500 billion annually, substantially exceeding the value of securities trading on the various stock exchanges in this country." [20]

The Senate Report concluded in part: "(t)he importance of futures trading to the general public and to the Nation equals the importance of the securities markets. It is, therefore, time to establish a regulatory authority in the commodity field similar

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[16] Ibid, page 5859
[17] Ibid, page 5859
[18] Ibid, page 5859
[19] Ibid, page 5859
[20] Ibid, pages 5859 & 5860

to the Securities and Exchange Commission..." [21] Most of the legislative history of the 1974 amendments to the CEA focuses on the formation of the CFTC, how that new agency should be constituted and the powers it should have to effect the important purpose of regulating commodity futures trading.

b. The sparse comments in Senate Report No. 93-1131 concerning Section 202 of the 1974 Act that amended the CEA to include a statutory definition of the term CPO point to a conclusion that is contrary to the conclusion of the Court on October 4, 2005.

On page 6 of its Opinion dated October 4, 2005 the Court cites the statutory definition of a CPO now found at 7 U S. C. § 1a(5). That definition is almost the exact same definition originally found in section 202 of Public Law 93-463 as originally enacted in 1974.[22] Senate Report No 93-1131 indicates that the Senate Committee on Agriculture and Forestry basically approved without change the provisions of section 202 of the Act originally contained in House Bill H.R. 13113 for the regulation of oth CTAs and CPOs. Section 202 of the Act contained the definition of a CPO cited by the Court on page 6 of its

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[21] Ibid, page 5860.

[22] The only difference is the fact that the current definition substituted the word "that" for the word "which" in this phrase of the definition "...in a business that is of the nature. ."

Opinion. [23]

The only comment the Senate Committee had with respect to Section 202 of the proposed Act was a concern "...that many individuals who are engaged in the buying and selling of commodities" might offer gratuitous "opinions on the value of commodities". The Senate Committee offered its opinion that any such "incidental" expressions would "...not bring either an employer or employee within the definition of 'commodity trading advisor' ". [24] This sole Committee comment with respect to Section 202 seems to reflect the clear expectation that individuals and entities referred to in Section 202 were expected by the Senate committee to be directly involved in the actual trading of commodity futures contracts.

c. The comments of Senate Report No. 93-1131 concerning Section 205 of the Act also lead to the exact opposite of the conclusion reached by the Court on October 4, 2005

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[23] The Court cites to Pub L No 102-546 after the statutory definition of CPO The current definition varies in no significant way from the definition contained in Section 202 of the 1974 Act as noted by previous footnote 22

[24] See S Rep No 1131, 93rd Con 2d Sess , reprinted in 1974 U S. Code Cong & Ads. News, 5843, 5864).

Even more to the point, however, are the comments found in the Senate Committee's Report with respect to Section 205 of the Act. Section 205 of the Act amended the CEA by adding a section 4n that pertained generally to registration with the newly created CFTC of CTAs and CPOs. Subparagraph 4n(4)(B) of Section 205 of the Act assumed that principals of CPOs might, as individuals, in the course of operating the commodity pool, take "futures market positions" on their own behalf.[25] Any such trading activity by individual principals of commodity pool operators had to be disclosed to pool participants.[26]

Subparagraph 4n(5) of Section 205 of the Act is even *more* on point. That subparagraph is now found currently codified at 7 U S.C. § 6n(4) which states:

> "Every commodity pool operator shall regularly furnish statements of account to each participant in his operations. Such statements shall be in such form and manner

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[25] For the full text of Sec 4n(4)(B) of P L 93-463 as enacted by Congress in 1974 see 1974 U S. Code Cong & Ads News, 93rd Con 2d Sess Volume 1, page 1601)

[26] The following comment of the Senate Committee with respect to that particular subparagraph of section 205 generally is instructive. "Futures market positions taken or held by individual principals of commodity trading advisors or commodity pool operators would be required to be fully disclosed to subscribers, clients or participants .." See S. Rep. No. 1131, 93rd Con. 2d Sess , reprinted in 1974 U S. Code Cong & Ads News, 5843, 5873).

> as may be prescribed by the Commission and shall include complete information as to the current status of *all trading accounts in which such participant has an interest.* (Emphasis added)

The Senate Committee's only comment on the above language of the Act was to simply restate the above language.

Finally, subparagraph 4n(7) of Section 205 of the Act authorized the CFTC to revoke deny or suspend the registration of any CPO

> "...if the Commission finds that such denial, revocation or suspension is in the public interest and that—
> (A) the operations of such person disrupt or tend to disrupt orderly market conditions, *or cause or tend to cause sudden or unreasonable fluctuations or unwarranted changes in the price of commodities.*" [27](Emphasis added)

Why would Congress ever deem it necessary to insert such a provision to ostensibly protect the integrity of the commodity futures markets if Congress did not clearly expect that the activities of CPOs would involve direct participation in commodity futures trading on recognized exchanges?

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[27] For the full text of Sec 4n(7) of P L 93-463 as enacted by Congress in 1974 see 1974 U S Code Cong & Ad News, 93rd Con 2d Sess Volume 1, page 1601)

d. Even the language specifically chosen by Congress to describe Title II of the Act itself (which contains Sections 202 and 205) points to the opposite conclusion reached by the Court on October 4, 2005

All provisions of the 1974 Act that pertain to CPOs and CTAs are found in Title II of that Act. Title I of that Act pertained solely to the creation of the CFTC and related provisions. The specific language used to describe the purpose and intent of Title II of the Act is directly instructive and once again points to a conclusion contrary to that of the Court. Title II is entitled: "REGULATION OF TRADING AND EXCHANGE ACTIVITIES". If the activities of CTAs and CPOs were not intended by Congress to directly affect trading and the exchanges on which trading occurs at the time the 1974 Act was passed, why would Congress place all statutory provisions that describe and affect CTAs and CPOs in Title II and use *those specific words* to describe Title II of the Act?

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COMMODITY FUTURES TRADING)
COMMISSION, and TYRONE C. FAHNER,)
Attorney General of the State of Illinois,)
Plaintiffs)
)
vs)
)
HERITAGE CAPITAL ADVISORY SERVICES,)
LTD , JEFFREY W WEAVER, and WARD)
A. WEAVER,)
Defendants)

Thursday, October 21, 1982
11:00 o'clock a m

Before the HON STANLEY J ROSZKOWSKI, Judge.

Hearing resumed pursuant to adjournment
PRESENT:

Mr. Constantine J. Gekas
Mr. Adrianne S. Harvitt
Mr. Stephen T Bobo

Mr. Robert McFarland

Mr. Paul Homer
Mr. Herbert L. Zarov

BY THE WITNESS:

A Because these are commitments to perform in the future, it is not necessary to buy first and then sell The trader may enter the market selling first

The incentive for entering the market on the buy side is that the trader expects the price of the commodities to rise, thereby hoping to sell later at a higher price.

If he expects the price of the commodity to fall, then he would sell first, hoping to buy later at a lower price, and thus, if his sell price is higher than his buy price, he'll have a profit. If his sell price is lower than his buy price, he'll have a loss

BY MR GEKAS.

Q Well, you've described traders on the floor of the pit and on the floor of the exchanges in areas that are called pits.

A That's right

Q How does a member of the investing public get involved in the futures market?

A A member of the investing public must open an account with a brokerage house which has been designated by the Commodity Futures Trading Commission as a futures commission merchant.

Once the account is opened, the futures commission merchant takes the instructions for the futures trade through.

BY MR GEKAS:

Q What about a commodity pool? In the parlance of the trade of the commodity futures industry, what's a commodity pool?

MR. HOMER: I'm going to object to the question, your Honor. This is one of the ultimate conclusions that is to be drawn as a matter of law.

THE COURT: I think he is asking for her opinion and based upon her expert knowledge what her opinion as to a commodity pool is.

Mr GEKAS: Yes, your Honor With that limitation, I'll pose that question.

BY THE WITNESS

A It's an entity solicited by a – or its solicited by a person or an entity, funds for the purpose of putting them into a common fund and then using funds out of that common fund for the purpose of investing commodity futures contracts

Mr. GEKAS:

Q And within the parlance of the trade and in your opinion, what is the extent of the risk and the potential for profit in that?

Mr. Homer: Objection. I don't find any relevance in that question in this case, your Honor.

THE COURT: I'm going to let her answer This is an opinion of this witness.

BY MR. GEKAS:

Q I mean, how do you share, in terms of your investment, in the profit or loss?

A Oh. In a commodity pool, the participants share in accrued profits from the commodity futures trading on a pro rata basis, that is to the extent that they contributed funds, they get the same percentage of the profits, and the losses are charged in the same fashion.

Q From where does a commodity pool operator get his funds, as a general matter?

A From members of the public.

Q What does he do with them when he gets them?

A He puts it into a common fund in a bank account, and from there – in the name of the pool – and from there he has to go to a futures commission merchant, open up a commodity futures trading account in the name of the pool, and deposit funds into the commodity pool trading account, and then he can begin trading commodity futures contracts.

Q Who does the trading for a commodities pool?

A The pool operator himself may make the trading decisions, or the pool operator may hire a commodity trading advisor to make the decisions for him.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

COMMODITY FUTURES TRADING COMMISSION,
Plaintiff,

v.

EQUITY FINANCIAL GROUP, LLC, TECH TRADER, LTD., MAGNUM CAPITAL INVESTMENTS, LTD., VINCENT J. FIRTH, ROBERT W. SHIMER, COYT E. MURRAY, & J. VERNON ABERNETHY
Defendants.

Civil No. 04-1512

NOTICE OF APPEAL

Notice is hereby given that Robert W. Shimer ("Shimer") acting pro se hereby appeals to the United States Court of Appeals for the Third Circuit from the final Opinion of the New Jersey District Court identified in the Record as Document No 593 filed on February 4, 2008 and entered February 5, 2008 concluding that Shimer violated the following sections of the Commodity Exchange Act ("Act"): 7 U.S.C. § 6b(a)(2)(i-iii), 7U.S.C § 6*o*(1)(A), 7 U S.C. § 13c(b) and 7 U.S.C. § 13c(a)

Notice is also given that Shimer also appeals the accompanying final Order of the District Court filed on February 4, 2008 and entered on February 6, 2008 identified in the record as Document No. 594 permanently enjoining Shimer as stated therein and requiring disgorgement by

Shimer in the amount of $1,452,117.00 as stated therein and further imposing upon Shimer civil penalties in the amount of $2,904,234.00 as stated therein.

Notice is also hereby given that Shimer further hereby appeals the District Court's previous Opinion (Document No. 472) concluding that Shimer aided and abetted violation by the defendant entity Tech Traders, Inc of CFTC regulation 17 C F.R. § 4.30 and Shimer also further appeals the accompanying District Court Order (Document No 473)

Notice is also hereby given that Shimer appeals the District Court's previous Opinion (Document No 419) filed December 18, 2006 and accompanying Order (Document No. 420) granting partial summary judgment to Plaintiff CFTC with respect to Shimer's alleged violation of 7 U.S.C § 6*o*(1)(B) and 7 U S.C § 6k(2) of the Act

Notice is also hereby given that Shimer **hereby appeals the District Court's Opinion filed November 16, 2006 (Document No. 409) and accompanying Order (Document No. 410) denying Shimer's motion for summary judgment with respect to all counts of Plaintiff's Amended Complaint.**

Notice is also hereby given that Shimer **hereby appeals the District Court's Opinion filed October 4, 2005 (Document No. 266) and accompanying Order (Document No. 267) denying Shimer's previous** 12(b)(1) and 12 (b)(6) motions and Shimer's previous **motion for summary judgment with respect to all counts of Plaintiff's Amended Complaint.**

Dated: Friday, February 15, 2008

/s/ Robert W Shimer
Robert W. Shimer
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Camp Hill, PA 17011
(717) 506-0645